

# SOCIAL POLICY REFORM: WHAT'S IN A FAMILY?

Nathalie Des Rosiers and Lorraine Pelot

The 2001 census confirms the diversity of close personal adult relationships in Canada. In addition to the conjugal couple, there is a variety of other arrangements, such as adult siblings sharing a home and adult children caring for aging parents. Numerous Canadian laws provide benefits or impose responsibilities and obligations on people because they live in relationships. The authors argue that some of these laws are overinclusive or underinclusive of relevant relationships. Governments should review legislation to determine whether relationships are relevant to the accomplishment of statutory objectives and should pursue a more comprehensive approach to the legal recognition and support of the full range of close relationships among adults.

Le recensement de 2001 a confirmé la diversité des relations personnelles qu'entretiennent entre eux les Canadiens adultes. Au-delà du couple conjugal, on observe en effet une variété de combinaisons qui peuvent notamment réunir sous le même toit des frères et des sœurs ou des adultes prenant soin de leurs parents vieillissants. Bon nombre de lois canadiennes prévoient pour nos concitoyens différents avantages, responsabilités et obligations en la matière. Or, certaines d'entre elles tiennent compte de ces relations d'inégale façon, en s'y immisçant trop ou trop peu selon le cas. Aussi nos gouvernements devraient-ils revoir ces lois pour déterminer si les relations personnelles ont une quelconque influence sur la réalisation d'objectifs législatifs, et adopter une approche plus globale visant à soutenir et à reconnaître juridiquement la pleine diversité des rapports entre adultes.

A few months ago, Statistics Canada released the results of the 2001 census on families. It presented a portrait of the diversity of personal relationships in Canada: unmarried couples, gay and lesbian couples, older children returning to live with their parents, young adults remaining in the parental home. This statistical picture is no surprise to people working in social policy. Indeed, these trends have been identified by researchers for a while.

In addition to the nuclear family centered on the conjugal couple, there has always been a variety of other living arrangements, including adult siblings sharing a home, widows and widowers forming blended families and multi-generational households. There is also a significant number of adults living alone, lone-parent families, and nonconjugal domestic relationships. What the census reveals is an accentuated pattern of change in the composition of households: more unmarried couples, and older children living with their parents. In addition, one must recognize that interdependent relationships also exist in the absence of a shared residence, beyond the concept of household used by the census.

Close personal adult relationships are relevant to a large number of Canadian laws. There are more than 1,800

sections in federal statutes, apart from the *Income Tax Act*, that use terms like spouse, husband and so on, to describe close personal relationships between adults. Most often, the government has used the most visible of these relationships — that between wife and husband — as a proxy for all close relationships when developing policies and programs. Marriage alone was the dominant recognized relationship for decades.

Demographic changes certainly do impact on social and legal policy. Recently, the “married” unit was redefined as the “spousal” unit, then the “conjugal” unit. In an effort to include common-law couples and now gay and lesbian couples, legislation, public policies and even collective agreements and insurance contracts have increasingly used an expanded definition.

Beyond that, however, the law has not recognized the increasing diversity of relationships reflected in the census. As a result, some laws might exclude people who should be included. For example, many statutes are organized around the idea that economic and psychological interdependency is a fundamental characteristic of only conjugality. In maintaining that focus, governments fail to look at other relationships that may share similar characteristics of

pooled income, shared residence or personal and psychological support. This is a mistake: focusing our social policies on marriage and conjugality prevents us from adequately supporting other relationships.

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trust, care for and depend on to meet their life needs. Some of these assumptions are out of date or inaccurate. As a result, some of these laws apply to more people than perhaps they should. The current law assumes that all marriages and conjugal relationships are the same. The reality is very different. Some couples share all their income, others do not. Some couples provide emotional and psychological support to each other, while others do not.

The impact of an overly narrow focus, on the one hand, and incorrect assumptions, on the other, is significant. There is a wide variety of Canadian laws that give benefits to or impose responsibilities and obligations on people because they live in relationships. Tax, immigration, and criminal statutes are just some of the laws where adult relationships come into play. For example, the *Evidence Act* prevents a married spouse from testifying in certain circumstances at the criminal trial of his or her married spouse. The provision focuses only on the presumed loyalty or psychological interdependency between “married” spouses, whether the couple exhibits this interdependency or not. What about other relationships? What about the unmarried couple or the adult child living with his or her parents? Why are they not treated the same way? Since the role removes spouses’ choice to testify and can lead to the exclusion of vital evidence, the basic question also remains, is this provision still necessary?

The analysis by the Law Commission of Canada supports a comprehensive review of the use of terms such as *spouses, conjugal partners, and family members* in legislation. The report submitted to Parliament proposes a methodology to review such legislative uses by first determining whether relationships

are relevant to the statutory objective or not. For example, the report recommends that sections of the *Employment Insurance Act* be modified so that people who work for family members are not penalized for being presumed to be involved in a fraudulent transaction. These provisions have a particular impact on the spouses and partners of small business owners, often women. The focus should be on whether any employment contract was manufactured for the purpose of claiming benefits.

The following three examples, drawn from the areas of caregiving, immigration and tax-free transfers of property, demonstrate situations in which relationships are relevant to the legislative objectives. However, these examples reveal that our laws are not responding sufficiently to diverse trends in close personal adult relationships.

The recently released 2003 federal budget promises to enhance the ability of employees to leave their work

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in order to care for someone at home. If they meet the eligibility requirements, workers will be entitled to a six-week employment insurance (EI) compassion-

ate family care leave benefit to care for their gravely ill or dying child, parent or spouse. Eligible family members, that is, those in parent-child or spousal relationships, will be able to share the benefit so they can each provide some caregiving. The aging population, deinstitutionalization and reductions in publicly funded home care services have contributed to a greater need for family, friends and communities to take care of people in their homes. This income replacement program under the EI regime will provide some relief in certain situations.

There are complementary laws in many provinces that give employees the right to take unpaid caregiving leave from their jobs. Coupled with the EI benefits, this leave can now be paid. Most of these statutes list qualifying family relationships such as spouses, children, parents, grandparents, grandchildren, siblings and other relatives who need care. While among themselves the provinces have more or less limited lists of relationships, they are broader than the relationships recognized by the federal government for the new EI benefits. In almost all cases, however, these closed lists fail to recognize nonfamilial close adult relationships in which part of the emotional interdependence may be caregiving.

Governments benefit when they encourage caring relationships that involve an exchange of personal care and support. Over the last few years, governments have been taking legal and fiscal steps to recognize the importance of caregivers and encourage their

continued role. Large numbers of older adults and persons with disabilities rely on family and friends. However, whether a caregiving relationship has

made the statutory list or not, caregivers' responsibilities can take a major toll on their economic security and physical, emotional and psychological health. Can employees not determine for themselves which relationships require them to take caregiving leave?

Allowing employees to self-designate would help ensure that, consistent with governments' objectives, informal caregiving relationships are encouraged and supported. The goal is the caregiving, not the relationship. Instead of depending on certain types of relationships, the relevant relationships should be determined by their function in people's lives. Potential abuses of the system could be addressed by placing caps on the number of days, as is proposed for the new EI coverage, or by asking employees to provide their managers with a list of close friends or others who may require care.

The announced compassionate family care leave benefit is restricted to a narrow range of family members in a defined set of particular circumstances. That program and other related leave provisions would better meet governments' objectives and reflect reality by allowing individuals to choose the relationships that matter to them most.

**I**n another area that focuses on relationships, Canada's immigration laws have long promoted the reunification of family members who form emotional and financial interdependent relationships. The government appreciates that reunification enhances self-reliance and supports the building of communities. The new 2002 immigration law extended the sponsorship provisions to family members not previously included. Under the family class, applications can be made for spouses, common-law or conjugal partners, parents, grandparents, orphaned brothers/sisters, nephews/nieces, grandchildren, and adopted or dependent children. The objective of the family class sponsorship provisions is to recognize and protect the integrity of close



Andy Clark/Reuters

#### Exchanging vows

personal relationships by facilitating the reunion of family members.

However, while Canada recognizes the importance of these relationships, they are limited to family members related by blood, adoption or conjugality. Some people may not have any "listed" family members. Many may have a very close friend they consider part of the family, a friend who may contribute emotional and financial support. A close friend could still apply under other grounds, but the family sponsorship route is more certain. Why not allow sponsorship of this

close friend? Rather than relying on a closed list of eligible family members, sponsors could designate the individuals they wish to sponsor. This allows people to decide for themselves which relationships are important to them.

Like the concerns over extending caregiving supports, governments may worry that opening the family class might lead to a significant increase in the number of immigrants. Some people are concerned that this broader category might be used to circumvent the law and jump ahead of other applicants. Sponsorship, however, is not

taken lightly; it comes with a serious financial commitment to support the immigrant for a number of years. There are also a number of ways to avoid unintended use of the family class, such as capping the number of individuals a person can sponsor over a lifetime or requiring evidence of emotional or economic interdependence.

The new immigration law has made some advances in recognizing additional family members who can be very important to a sponsor. However, the category could be broadened still more to allow Canadians to identify their most meaningful relationships themselves.

**F**inally, the *Income Tax Act* also relies on the existence of close adult personal relationships in a large number of provisions. One area that has not yet responded to the reality of changing relationships relates to the ability of spouses and common-law partners to transfer capital property between each other on a tax-free basis (a “rollover”). Under normal circumstances, when a person gives away capital property as a gift or bequest, the tax system overrides the notion of gift and considers the property “sold” at the fair market value for that sort of property. The difference between the market value and what the person paid for it in the first place is called a capital gain and is taxed as part of that person’s income. Under the rollover provisions available to spouses and common-law partners, property, such as the family home, is considered by the tax authorities to be transferred at cost rather than at market value such that there are no capital gains to be taxed until the spouse getting the property sells it to someone else. The law rests on a presumption that conjugal couples who transfer property between themselves are doing so in the larger context of shared financial resources, where it is difficult to separate who owns what.

Given the diversity of living arrangements today, is it fair to restrict

the rollover provisions to conjugal couples? Are all conjugal relationships characterized by the economic interdependence that the government wants to promote? The answer to both questions is no. Other close adult relationships, such as siblings living together for most of their lives, exhibit entangled financial resources. A transfer of capital property between them may also be informal and outside the market. They may not expect that such a transfer would entail large tax consequences. On the other hand, not all conjugal couples share resources. The government’s objectives would be better served by permitting rollovers for close relationships that are financially

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interdependent. In this case, self-selection would not work. Instead, rollovers would be available to people in relationships that meet certain criteria, such as length of cohabitation.

The three examples demonstrate the potential ineffectiveness of laws that focus solely on conjugal relationships. Overall, governments should determine whether relationships are relevant to the achievement of statutory objectives and should pursue a more comprehensive approach to the legal recognition and support of the full range of close relationships among adults.

Such reforms require looking at the functions served by relationships as opposed to their legal status. This is a radical move from the bright-line test traditionally used to establish if certain relationships should be recognized in various areas of the law. People are either married or not, related or not. It is much easier to examine a marriage or birth certifi-

cate than to determine if people are sharing their financial resources. Determining the existence of common-law relationships is somewhat more difficult, but the government has responded by setting a time limit on cohabitation that may or may not respect people’s choices. Other legal systems can be developed to provide a clearer path to identifying relevant relationships, systems that respect people’s choices while enhancing the effectiveness of the law.

**G**overnments regulate and recognize personal relationships in two very distinct ways. First, as discussed above, through a number of statutes governments take into account the economic and emotional interdependencies of personal relationships. Second, governments provide legal structures to help people regulate their own affairs and protect their expectations. These frameworks facilitate an assumption of rights and responsibilities and promote a degree of certainty and stability in the relationship. For a long time, marriage was the only model that the government recognized. The legal ceremony of marriage serves to help people publicly make a commitment to each other and assume a range of responsibilities toward one another. In recent years, some rights and responsibilities were extended to include common-law couples, both opposite- and same-sex. Consistent with their approach to the recognition of interdependency, governments, when providing legal structures, almost exclusively restrict recognition and support to conjugal relationships.

However, whether we look at older people living with their adult children, adults with disabilities and caregivers, or siblings cohabiting in the same residence, the “marriage” model is inadequate. Some of these other relationships are also characterized by emotional and economic interdependence, mutual care and concern and the expectation of some duration. All of these personal

adult relationships could also benefit from legal frameworks to support people's need for certainty and stability.

It is important to provide for more flexibility in legal arrangements. Currently, marriage is the only voluntary predetermined legal vehicle by

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which people can seek to ensure a certain stability in their relationships. Though recognized, common-law couples lack the voluntariness that characterizes marriage — they are automatically deemed subject to the law after a certain period of cohabitation. Other types of relationships have no choice to make. This is no longer a sufficient model, given the variety of relationships that exist in Canada today.

Registered partnership systems exist in a number of countries, including some Canadian provinces, but most of these are limited to conjugal couples. Governments could develop registration mechanisms open to both conjugal and nonconjugal relationships so that people who wish for cer-

tainty and stability can voluntarily choose from a variety of models that suit their particular arrangement. Stability and the possibility of regulating one's affairs should not be dependant on sexual intimacy. Although it is true that people can always retain the

services of lawyers to draft contractual arrangements, governments can help by creating frameworks and predetermined legal obligations to help relationships flourish with fairness and stability. The diversity of relationships warrants an expansion of the range of mechanisms available to citizens to regulate their own affairs.

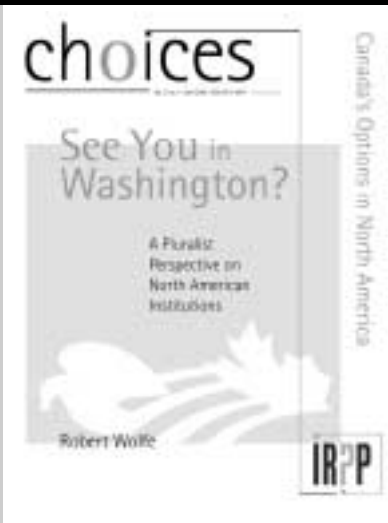
The diversity of relationships in Canadian society is a reality. We cannot afford to continue to develop policies that are based solely on visions of families that exclude a large majority of citizens. For many Canadians, the relationships that they hold dear, as varied as they are, constitute an important source of comfort and are what helps them continue to be productive

members of society. Recognition of nonconjugal relationships will require that governments start from an even playing field and abandon long established assumptions about relationships. Governments should recognize the choices that citizens make to enhance their capacity to meet their needs: a diversity of relationships requires more flexibility and creativity in legislation and policy making.

What's in a family? Much more than a name. It is now time for governments to move beyond the notion of conjugality and to recognize and support the diversity of close personal adult relationships formed by Canadians.

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